IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARCOS R. LOZANO, Appellant.	No. 41177-6-II UNPUBLISHED OPINION

Armstrong, J. — Marcos Lozano appeals his conviction for second degree rape, arguing that (1) the trial court violated his Sixth Amendment right to present a defense when it excluded sexually suggestive photographs of one victim and (2) his defense counsel ineffectively represented him by failing to move to sever the two second degree rape counts at the close of the State's evidence. Lozano also asserts numerous claims in his statement of additional grounds, including that insufficient evidence supports his second degree rape conviction. We hold that the trial court erred in joining the two rape charges because the trial judge relied on RCW 10.58.090, which the Supreme Court has since declared unconstitutional in *State v. Gresham*, ___ Wn.2d ___, 269 P.3d 207 (2012). Because we cannot conclude the joinder was harmless error, we reverse and remand for a new trial.

FACTS

The State charged Lozano with two counts of second degree rape following two separate incidents in February 2009.

A. Count I

Lozano met Brittany Smith online through MySpace, a social networking web site. On February 16, 2009, Smith met Lozano at the Log Cabin Bar and Grill in Lacey. Smith recently turned 21. She remembered having about two drinks that night but felt more incoherent than she had ever felt. She felt like she could not stay awake or stand up straight, and she was numb and dizzy.

Later that night, Lozano took Smith to his house. He had to help her to the car because she could not walk straight. Before getting into the car, Smith asked if she could sleep on his couch until she sobered up enough to drive home in the morning; Lozano said she could. Smith remembers little of the drive to Lozano's house.

When they arrived, Lozano had to drag Smith up the stairs because she still could not walk straight. He took her cell phone from her and she became scared. Lozano told her to sit on the bed. Smith asked if she could sleep on the couch, but Lozano said she should sleep on the bed.

When Lozano started to take Smith's clothes off, she protested and said she did not want to have sexual intercourse. Smith had no strength and was slipping in and out of consciousness. She tried to roll over to protect her body.

Lozano digitally penetrated Smith's vagina. She again said no and continued to slip in and

out of consciousness. An hour later, Smith woke up naked. She went to the bathroom and saw semen between her legs and around her vagina.

Later, in a recorded phone conversation, Lozano denied having sexual intercourse with Smith and said he did not remember that night. During trial, the State presented evidence that Lozano's sperm was on Smith's underwear.

Lozano testified that he put his hands inside Smith's underwear and Smith said, "[N]o, no." Report of Proceedings (RP) at 531-32. He denied having vaginal intercourse with Smith.

B. Count II

Lozano also met Candice Greco online through MySpace. He was able to view the photographs that Greco had posted on her MySpace page.

On February 7, 2009, Lozano and Greco arranged to meet. At 2:30 a.m., Lozano finished his shift at work and walked through the parking lot to his car. Greco pulled her car up to Lozano and introduced him to her close friend, Ashley Beecher. Beecher and Greco decided to follow Lozano to his house to drink.

During the car ride to Lozano's house, Greco observed that Beecher was intoxicated but able to carry on a conversation. Beecher had consumed multiple drinks before Greco picked her up, and fell asleep in the car. The only thing Beecher remembers about the car ride was pulling up to Lozano's residence.

When they arrived at Lozano's house, the three went upstairs to his bedroom. Lozano brought an 18-pack of beer and gave one to each of the women and opened one for himself. About five minutes later, Beecher fell asleep on the small couch next to Lozano's bed.

Lozano and Greco talked to each other, drank several beers, listened to music, started to watch a movie, and had consensual intercourse. Greco fell asleep. Later, she woke up and saw Lozano having sexual intercourse with Beecher while Beecher was just lying there. Greco yelled at Lozano to get off Beecher and he did.

Beecher testified that she remembered walking into Lozano's apartment, seeing a couch with a bed right in front of it, and falling asleep right away. She was fully clothed. She woke up, disoriented and concerned because Greco was yelling. Greco told her to get her clothes on, but she thought she was clothed. Beecher had a shirt on and nothing else. Beecher testified that a blanket was thrown on her while Greco yelled at her to get her clothes on so that they could leave. Beecher grabbed her clothes and then saw Lozano move as though he was taking off a condom and putting it in the trash. She testified that she was not sober at the time.

Beecher and Mohamed Young, whom Beecher called "McKay," had an online friendship. McKay heard that Beecher met Lozano and sent her an online message about it. Beecher then called McKay and told him what had happened that night with Lozano. When McKay asked what she was going to do about it, Beecher responded, "I'm just going to stay the hell away from him." RP at 80.

Later, McKay called Beecher to ask whether she had reported the incident because Lozano had been arrested for rape. Beecher reported the incident after her conversation with McKay. McKay testified about his conversations with Beecher.

Lozano testified that he and Beecher had sexual intercourse on the couch. When Greco woke up, she got mad and the two women dressed and left.

Before trial, the State moved to join count I, involving Smith, with count II, involving Beecher. The trial court initially denied the motion but granted it on reconsideration. In granting the State's motion for reconsideration, the trial judge stated, "I'm going to reconsider and join them. After reconsideration, and I—I am not persuaded, except I have reread 10.58,[1] and I believe that [they] would come in." RP (Nov. 5, 2009) at 10. The court's written order stated that it would grant the State's motion to reconsider and join the two cause numbers for trial, after balancing the *York* factors.[2] The trial court provided no other reasoning for joinder or for permitting evidence of two separate charges to be cross-admissible.

Lozano sought to introduce 20 photographs of Greco and Beecher at trial. The pictures show two women at dancing bars; it is unclear whether Beecher appears in the photographs. At the time Greco and Lozano were communicating online, these photos were displayed on Greco's MySpace page. The trial court excluded the photographs as irrelevant.

The jury found Lozano not guilty of count I (Smith), but guilty of count II (Beecher).

ANALYSIS

I. Joinder

Lozano contends that his defense counsel was ineffective for failing to move for severance of the two second degree rape counts at the close of evidence. The argument is premised on Lozano's mistaken application of CrR 4.4(a)(2), which requires a defendant whose pretrial

[1] RCW 10.58.090 provided that "[i]n a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." The Washington Supreme Court struck down this statute in *Gresham*, 269 P.3d 207.

[2] *State v. York*, 50 Wn. App. 446, 749 P.2d 683 (1987).

severance motion is denied to renew it at the "close of all the evidence." If he does not, severance is waived. CrR 4.4(a)(2). Lozano made no pretrial motion: the State moved to join the two counts that it originally charged separately. Because there was no pretrial motion to sever, CrR 4.4(a)(2) does not apply. And because Lozano objected to both the State's original motion to join and its renewed motion, he has preserved the issue for appeal. We review this issue for trial court error.

CrR 4.3(a) permits two or more offenses to be joined when the offenses are of the same or similar character. The trial court should sever the counts if it will "promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A defendant who opposes joinder must demonstrate that it is so manifestly prejudicial that it outweighs the interest in judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). In determining whether two counts should be tried together, a court must consider (1) the strength of the State's evidence on each count; (2) the clarity of the separate defenses; (3) the court's instructions directing the jury to consider each count separately; and (4) the admissibility of the evidence of one charge in a separate trial of the other charge. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court initially denied the State's motion to join, finding that it would confuse the jury, allow it to accumulate evidence between the two counts, and that the evidence would not be cross-admissible. But on reconsideration, the court said only that it had "reread 10.58, and I believe that [they] would come in." RP (Nov. 5, 2009) at 10.

The jury found Lozano not guilty of count I. Thus, on remand, the issue will not be joinder but, rather, whether the evidence is admissible under ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character

> of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before allowing such evidence,

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Gresham, 269 P.3d at 213 (citations omitted).

The proponent of the evidence has the burden of establishing the first, second, and third elements. *State v. Devincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Because the trial court considered joinder, not the admissibility of ER 404(b) evidence, it did not engage in this analysis. And we are unwilling to attempt an ER 404(b) analysis on the record before us.

The trial court originally believed the evidence would confuse the jury and allow it to accumulate evidence between the two charges; comments that suggest the court believed trying the two incidents together would prejudice the defendant. The trial court initially denied the State's joinder motion:

> I'm going to deny the motion. I do not think the clarity of the defenses can be made, and so they will be separate. . . . But, again, even with the new law, what I do point out is the necessity of evidence beyond the testimony, but one of the things is whether or not the prior act was a criminal conviction. It's not. . . . I do believe these are very separate instances."

RP (Oct. 8, 2009) at 9.

Because of these comments and the trial court's failure to address any of the ER 404(b) factors on the record, we reverse.[3]

[3] In addition, the issue of how Lozano's acquittal of count I will affect the ER 404(b) analysis is

II. Photographs

Lozano argues that the trial court violated his Sixth Amendment right to present a defense when it excluded the photographs of Beecher and Greco found on Greco's online web site.[4]

A defendant has a right to present evidence in defense of the crimes charged. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. We review a potential denial of a Sixth Amendment right de novo.[5] *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). But a criminal defendant has no constitutional right to admit irrelevant evidence. *See State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Under ER 402, "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

If the defense offers evidence that has some relevance, the State must show that the evidence is so prejudicial as to interfere with the jury's fact finding process. *Jones*, 168 Wn.2d at 720. The trial court must balance the State's interest in excluding the evidence against the defendant's need for the information sought. *Jones*, 168 Wn.2d at 720. If the evidence is highly probative, "no state interest can be compelling enough to preclude its introduction consistent with

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not before us; the parties will have the opportunity to brief that on remand.

[4] In his statement of additional grounds, Lozano repeats this argument.

[5] Generally, the admission or refusal of evidence lies within the sound discretion of the trial court, which we review for an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Lozano does not argue that the trial court abused its discretion; rather, he argues that excluding the photos violated his constitutional rights.

the Sixth Amendment and Const. art. 1, § 22." *Jones*, 168 Wn.2d at 720 (citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). But if the evidence of the complaining witness's prior sexual conduct is not relevant, neither the Sixth Amendment nor article 1, section 22 of the Washington Constitution require the trial court to admit it. *See State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426, *review denied*, 173 Wn.2d 1004 (2011).

The State charged Lozano with second degree rape under RCW 9A.44.050(1)(b), which requires the State to prove that Lozano had sexual intercourse with Beecher while she was incapable of consent because she was physically helpless or mentally incapacitated. Lozano's defense at trial was that he reasonably believed that Beecher was capable of consenting and that she was not physically helpless or mentally incapacitated at the time. RCW 9A.44.030.[6]

Lozano argued to the trial court that the photographs, available at Greco's online MySpace page, "go towards his belief about what he thought might occur with these particular individuals based on things that he knew about them." RP at 437-38. On appeal, Lozano argues that the photographs were highly relevant to (1) whether Beecher initiated the sexual activity with him and (2) whether it was reasonable to believe that Beecher was not mentally incapacitated at the time. Lozano points out that he "had to prove that he reasonably believed Beecher understood the nature and consequences of having sexual intercourse with him soon after he had

[6] RCW 9A.44.030 provides:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

The trial court instructed the jury on this statutory defense.

sexual intercourse with her close friend, who was sleeping [nearby]." Br. of Appellant at 21.

Lozano relies on *Jones*, 168 Wn.2d 713, to support his assertion that excluding the photographs in this case violated his constitutional right to present his defense. In *Jones*, the defendant proffered evidence that the sexual intercourse underlying the second degree rape charge occurred at a drug-fueled sex party at which the victim danced for money and engaged in consensual intercourse with three men. *Jones*, 168 Wn.2d at 717. The trial court excluded any reference to the sex party, reasoning that such evidence was offered to attack the victim's credibility barred by the rape shield statute. *Jones*, 168 Wn.2d at 717-18. The Supreme Court reversed, concluding that the party evidence was highly probative because it supported Jones's testimony that the victim consented to sex. *Jones*, 168 Wn.2d at 721. Further, the Court held that the rape shield statute did not apply because Jones's evidence referred to conduct on the night of the alleged rape and not to the victim's past sexual conduct. *Jones*, 168 Wn.2d at 722-23.

The facts here are distinguishable from *Jones*. Lozano's defense is not that he and the two women were engaging in a sex party where he had witnessed Beecher actively engaging in sex at the time of the alleged rape. In fact, he does not claim that Beecher engaged in any sexual conduct immediately before he had intercourse with her. Further, Lozano testified that he did not know Greco was bringing Beecher with her to their arranged encounter that night; specifically, he testified that he was surprised Greco brought a friend. In addition, there are no factual similarities between the incident forming the basis of the present charge and the conduct shown in the photographs. *See Hudlow*, 99 Wn.2d at 10-11 (woman's consent to sexual activity in the past,

without more, such as particularized factual similarities to the present occasion, does not even meet the bare relevancy test).

More importantly, the photographs do not shed light on whether Beecher was physically and mentally capable of consenting to sexual intercourse with Lozano. Nor did the photographic evidence make it more or less likely that Lozano reasonably believed that Beecher's mental and physical conditions allowed her to consent to sexual intercourse. Finally, Lozano was fully able to present his defense theory through his own testimony. We conclude that the trial court did not violate Lozano's Sixth Amendment right to present a defense by excluding the photographic evidence.

III. Statement of Additional Grounds (SAG)

A. Insufficient Evidence

Lozano appears to argue that insufficient evidence supports his second degree rape conviction. He asserts that: (1) Beecher was not sleeping during the incident; (2) there was a lack of physical evidence; (3) Beecher was not credible at trial because she could not remember seeing defense counsel seven months earlier; and (4) because he was intoxicated that night "it would be hard for me to determine [Beecher] was not . . . saying no or stop." SAG at 1-3, 5.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant who claims insufficient evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). We consider circumstantial and direct evidence to be equally reliable. And we defer to the jury on all issues of witness credibility and the persuasive force of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Lozano of second degree rape, the jury had to find beyond a reasonable doubt that he engaged in sexual intercourse with Beecher when she was incapable of consent by reason of being physically helpless or mentally incapacitated.

Both Beecher and Greco testified in detail about the events leading up to and surrounding the rape. Both women testified that Beecher was intoxicated and fell asleep immediately upon arriving at Lozano's house. Greco testified that she saw Lozano having sexual intercourse with Beecher, while Beecher was just lying there. When Greco yelled at Lozano, Beecher woke up feeling disoriented and concerned. Considered in the light most favorable to the State, this evidence was sufficient to convict Lozano of second degree rape.

B. Consistent Verdicts

Lozano contends that the jury must have found him credible to find him not guilty of count I and, therefore, his conviction on count II is inconsistent.

The verdicts here are not inconsistent. That the jury convicted Lozano of count II and not count I simply means that they believed the State proved count II beyond a reasonable doubt and did not meet that standard for count I. The counts concerned different victims and different circumstances, and nothing about the verdicts is inconsistent or contradictory. *See, i.e.*, *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) (jury's conviction for first degree robbery upheld, notwithstanding jury's acquittal of felony murder charge). Thus Lozano's contention is not a

basis for relief.

C. Overcharging by Prosecutor

Lozano next argues that the prosecutor overcharged him because Beecher did not have any injuries. He asserts that the State offered to amend the charge in Smith's case to third degree rape.

Prosecutors have discretion in their charging decisions. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). We may not substitute our judgment for the prosecutor's. *Lewis*, 115 Wn.2d at 299. Lozano's claim of abuse of prosecutorial discretion is without merit.

Here, the State charged Lozano with second degree rape. RCW 9A.44.050(1)(b) states:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> . . . .
> (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

Second degree rape does not require proof of a physical injury. And because there is sufficient evidence to support the jury's finding that Lozano engaged in sexual intercourse with Beecher when she was incapable of consent by reason of being physically helpless or mentally incapacitated, Lozano's argument fails.

Lozano's remaining issues are unlikely to occur on retrial, and we decline to address them.

We reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.